Office-Supreme Court, U.S.
FILED
MAR 9 1981
ALEXANDER L. STEVAS,
CLERK

80-1518

No.

IN THE

Supreme Court of the United States

March Term, 1981

NORMAN DAVIS, on behalf of his infant son,
JAMES DAVIS,

Petitioner,

v.

MAINE ENDWELL CENTRAL SCHOOL DISTRICT,
et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI

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March 3, 1981

QUESTION PRESENTED.

Whether the Court of Appeals correctly held that a handicapped child in a public elementary school bringing a private cause of action under Section 504 of the Rehabilitation Act of 1973 (27 U.S.C. §794) must first exhaust administrative remedies under the Education for All Handicapped Act (20 U.S.C. §1401 *et. seq.*).

PARTIES TO THE PROCEEDING.

In the District Court below, Norman Davis, on behalf of his infant son James, as Plaintiff, brought suit against:

Maine Endwell Central School District;

Lawrence Rice, in his official capacity as President of the Board of Education for Maine Endwell Central School District;

William O'Connor, in his official capacity as Superintendent of Schools for the Maine Endwell Central School District;

John Oakes, in his official capacity as Chairman of the Committee of the Handicapped.

The real party in interest in the case is the Maine Endwell Central School District.

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MAINE ENDWELL CENTRAL SCHOOL DISTRICT, *et al.*,

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals, for which review is sought, is unreported.

A copy of the opinion is included in the Appendix to this Petition. The District Court Memorandum-Decision and Order is not reported but is included in the Appendix.

JURISDICTION.

The opinion of the Court of Appeals was entered on December 9, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1234(1).

STATUTE INVOLVED.

The statute in question in this case is Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. §794; the statute originally provided:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7 (6) (29 U.S.C. § 706[6]), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 504 was amended in 1978 to provide for non-discrimination by federal agencies and after amendment now reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7 (7) (29 U.S.C. § 706[7]), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be

necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

STATEMENT.

Petitioner brought these actions against respondent Maine Endwell School District and individual officials of the District. Petitioner alleged his eleven-year-old son suffered from visual-motor-perceptual problems and delayed or defective auditory development and was excluded from respondent's elementary school solely on the basis of his handicap in violation of Section 504 of the

Rehabilitation Act of 1973, 29 U.S.C. §794.[1] Petitioner sought injunctive relief and damages.

This District Court dismissed petitioner's suits without prejudice for failure to exhaust the administrative remedies available under the Education For All Handicapped Act, 20 U.S.C. §1415 (B42). Petitioner contended in both the District Court and the Court of Appeals that exhaustion should not be required under Section 504. The Court of Appeals affirmed the dismissal of petitioner's claim for injunctive relief but remanded for consideration of the merits of the claims for compensatory damages (A3).

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1. Petitioner also brought claims under the Education For All Handicapped Act (20 U.S.C. 1401, *et seq.*) (42 U.S.C. §1983); and the Due Process and Equal Protection Clause of the United States Constitution. The jurisdiction of the Court was invoked pursuant to 28 U.S.C. §1331(a) and 1343 (3)(4).

The Court of Appeals did not render a formal opinion but relied on the decision of the District Court in dismissing petitioner's claim for injunctive relief.

The District Court relied heavily on the administrative enforcement scheme for Section 504 in holding that petitioner must exhaust administrative remedies under the Education For All Handicapped Act (B19-B20). The court noting the "significant overlap" between the Acts and took the position that petitioner "totally sidestepped" the statutorily imposed procedures for administrative review. The court found further support for its position by noting that courts lack the specialized expertise involved in educational decisions.[2] Finally, the

2. Specifically the court concluded, (T)hat the exhaustion requirements in the Education Act:

> represent Congressional recognition of the view expressed by the Supreme Court in another

court concluded that assuming jurisdiction over petitioner's 504 or Constitutional claim prior to exhaustion under the Education For All Handicapped Act would serve no useful purpose and merely serve to frustrate the clear Congressional intent with regard to administrative review.

(2 cont.)
school context that these educational questions lie in an area in which the courts' 'lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.' *San Antonio School District v. Rodriguez*, 411 U. S. 1 (1973).

Harris v. Campbell, supra, 472 F. Supp. at 55 (B39).

REASONS FOR GRANTING THE WRIT.

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF SECTION 504 OF THE REHABILITATION ACT OF 1973 (29 U.S.C. §794).

The Second Circuit's holding that petitioner must exhaust administrative remedies under the Education For All Handicapped Act as a prerequisite to maintaining a private cause of action under Section 504 conflicts with the Fifth Circuit's decision in *Camenish v. University of Texas*, 616 F. 2d 127, rehearing denied 618 F. 2d 1389, holding exhaustion would not be required. It also conflicts with the Ninth Circuit's decision which followed *Camenish* in holding exhaustion would not be required for a plaintiff bringing a private cause of action under Section 504. *King v. County of Los Angeles*, 633 F. 2d 876, 879 (9th

Cir. 1980). This Court granted certiorari in *Camenish* on November 3, 1980, 44 U.S.L.W. 3332.[3]

The Fifth Circuit reasoned that an inappropriate exhaustion requirement could effectively do away with a private cause of action under Section 504. *Camenish, supra*, page 134. In refusing to require exhaustion the court relied on this Court's decision in *Cannon v.*

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3. This court left open the question of whether a private right of action should be implied under Section 504 in *Southeastern Community College v. Davis*, 442 U. S. 397 (1979). The issue appears to be squarely before the Court in *Camenish*. Petitioner addresses only the exhaustion issue and relies on the arguments made by the respondent and federal respondents, together with the fact that each Court of Appeals that has confronted the issue has held a private right of action can be maintained under Section 504. See, e.g., *Lloyd v. Regional Transp. Auth.*, 548 F. 2d 1277 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F. 2d 413 (8th Cir. 1977); *NAACP v. Medical Ctr. Inc.*, 599 F. 2d 1247 (3rd Cir. 1979); *New York State Association for Retarded Children v. Carey*, 612 F. 2d 644 (2nd Cir. 1979); *King v. County of Los Angeles*, 633 F. 2d 876 (9th Cir. 1980).

University of Chicago, 441 U. S. 667 (1979). In *Cannon* this Court held there was a private cause of action under Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*). The Fifth Circuit noting the regulations that the Department of Health, Education and Welfare adopted to implement Section 504 adopt the Title VI enforcement procedures, 45 C.F.R. §84.61 (1979), the same administrative procedures used to enforce Title IX, 45 C.F.R. §86.71 (1979), relied on this Court's refusal to require exhaustion in *Cannon* to support its holding that Congress intended plaintiffs to have access to the courts to enforce individual private actions under Section 504. *Camenish, supra*, page 135. Furthermore in the two decisions by this Court addressing Section 504, exhaustion was not

required. *Southeastern Community College v. Davis*, 422 U. S. 397 (1979), and *Campbell v. Kruse*, 434 U. S. 808 (1977).

In *Southeastern* the exhaustion issue was not before the court, but both the District Court, *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1344 (1976), and the Court of Appeals, *Davis v. Southeastern Community College*, 574 F. 2d 1158, 1160 (4th Cir. 1978), rejected Southeastern's arguments that exhaustion should be required under Section 504. In *Campbell*, this Court vacated and remanded a lower court decision that had been based on Constitutional grounds and directed the court to decide the claim based on Section 504. *Campbell v. Kruse*, 434 U. S. 808 (1977).[4]

4. It is clear *Campbell* reaffirms the long standing principle of not reaching Constitutional grounds without first determining if statutory grounds are dispositive. It follows then that

In a recent decision the Second Circuit refused to require exhaustion concluding Section 504 is "intended to be a

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(4 cont.)
the Constitutional claim petitioner seeks to enforce through 42 U.S.C. 1983 will not be reached if the statutory grounds are determined to be dispositive.

Although it is well settled either the Education For All Handicapped Act or Section 504 may be enforced through 42 U.S.C. 1983 (See: *Maine v. Thiboutot*, U. S. , 65 L. Ed. 2d 555 [1980]), the availability of this remedy does not change the result in the instant case. Although there are several exceptions it is clear that a plaintiff maintaining a 1983 action must first exhaust administrative remedies. *Eisen v. Eastman*, 421 F. 2d 560 (2d Cir. 1969, cert. denied, 400 U. S. 841 [1970]). In *Eisen*, the Court specifically condemned a "wooden" approach to the doctrine holding exhaustion would not be required where the administrative remedy is inadequate or where it is certainly or probably futile. *Eisen, supra*, page 569. This in turn, albeit through a different avenue requires deciding whether or not the administrative procedures available under the Education For All Handicapped Act provides an adequate remedy for a plaintiff maintaining a discrimination claim under Section 504. If this question is answered in the affirmative petitioner's 1983 claim will fail. In fact, that is precisely what happened in this case. Accordingly, the availability of 1983 is not dispositive of the question presented in the instant petition.

part of the general corpus of discrimination law" in *New York State Association For Retarded Children v. Carey*, 612 F. 2d 644, 649 (2d Cir. 1979). *Carey* involved the exclusion of certain mentally retarded children from regular school classes because they were carriers of serum hepatitis. There were at least 48 children involved. The only distinction between *Carey* and the instant cases is the number of plaintiffs involved.

The support for this distinction stems from Mr. Justice Blackman's concurring opinion in *Lau v. Nichols*, 414 U. S. 563, 571-2 (1974). *Lau* involved a challenge by some 1800 Chinese children who did not speak English, contending the failure of the San Francisco school system to provide them English instruction was discriminatory conduct

in violation of Title VI. Mr. Justice Blackman stated,

> "* * * I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom.
>
> "I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child * * *, I would not regard today's decision * * * as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly." *Lau v. Nichols*, 414 U. S. 563, 571-2 (1974).

The Tenth Circuit relied on Mr. Justice Blackman's opinion in holding that a private right of action will exist under Title VI only when a "substan-

tial group" is being deprived of an education. *Serna v. Portales Municipal Schools*, 499 F. 2d 1147, 1134 (10th Cir. 1974). The Seventh Circuit relying on *Serna* and Mr. Justice Blackman's opinion concluded no individual private right of action should be implied under Title IX but that a private right of action may be implied if a large number of people mount a challenge under Title IX. *Cannon v. University of Chicago*, 559 F. 2d 1063, 1072 (7th Cir. 1976).[5] This Court rejected the premise that the existence of a private right of action should turn on the number of plaintiffs involved in *Cannon v. University of Chicago*, 441 U. S. 677 (1979). As this Court pointed out,

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5. On rehearing the Court gave additional reasons for concluding a private right of action should not be maintained, but they are not pertinent here, *Cannon v. University of Chicago*, 559 F. 1077 (7th Cir. 1976).

> "Whatever disruption of the academic community may accompany an occasional suit seeking admission is dwarfed by the relief expressly contemplated by the statute - a cutoff of all federal funds." *Cannon v. University of Chicago*, 441 U. S. 677, 716 n. 44 (1979).

This distinction should be rejected here as well.[6]

The only other explanation for the Second Circuit's decision is that it implicitly invoked the doctrine of primary jurisdiction. The Court remanded the case for consideration of the merits for compensatory damages because "it appeared at oral argument" that petitioner was in the process of pursuing administrative

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6. The fact that in this case the private right of action is undisputed, and the distinction applied only to the issue of exhaustion provides sound support for the Fifth Circuit's concern that an exhaustion requirement would in effect do away with the private right of action under Section 504.

remedies (A3). Yet, from the beginning petitioner has vigorously contended he has not been given an opportunity to be heard on his Section 504 claim.

Indeed, in the present posture of the case petitioner did not seek review of any agency action, but claims he is being denied his right to a free appropriate public education solely based on his handicap. This Court has held that the doctrine of primary jurisdiction,

> "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. Western Pacific Railroad Co.*, 352 U. S. 59, 64 (1956).

In this civil rights claim there is no reason for the court to defer to the special competence of the administrative agency in that petitioner contends he was excluded solely on the basis of his handicap and respondent does not dispute the fact that petitioner is handicapped.

It is important to point out that petitioner does not contend a court may not resort to the doctrine of primary jurisdiction in an appropriate case. Professor Davis has pointed out that "the doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision." 3 *K. Davis*, Administrative Law Treatise, paragraph 19.01 at 2 (1958). It may well be that where the issue turns on the "appropriateness" of a placement which brings into play the expertise of

the agency a court may want to stay its hand.

This is unlikely to occur under Section 504 in that it is not designed to redress individual grievances.[7] On the other hand, if the result contemplated herein is permitted, namely, requiring petitioner to exhaust the administrative procedures under the Education For All Handicapped Act, the doctrine of primary jurisdiction will have the practical effect of a blanket exclusion of civil rights plaintiffs from the federal

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7. The District Court noted the Department's intention not to review the result of individual placement or educational decisions except in extraordinary circumstances (B20). Even then however the only remedy is a cutoff of federal funds. This court noted that a federal fund cutoff is often inappropriate as a means of protecting individual citizens against discriminatory practices. *Cannon v. University of Chicago*, 414 U. S. 677, 705 (1979).

courts.[8] This point is addressed in petitioner's next argument that Congress did not contemplate such a result in promulgating the Education For All Handicapped Act.

2. CONGRESS DID NOT INTEND TO REPEAL PREEXISTING REMEDIES AVAILABLE TO HANDICAPPED CHILDREN IN PROMULGATING THE EDUCATION FOR ALL HANDICAPPED ACT (20 U.S.C. §1401 *ET SEQ.*).

There is no evidence that Congress intended to repeal any existing rights available to handicapped children in promulgating the Education For All Handicapped Act, 20 U.S.C. §1401 *et seq.* To the contrary in that the Senate Committee Report accompanying the bill that

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8. The availability of damages to a plaintiff who finally gains access to a federal forum after exhausting the Education For All Handicapped Act remedies will offer little consulation to a child who has regressed to the point when the harm is irreparable and a future as a second class citizen a virtually certainty.

became the 1975 Act makes clear that Congress found there was a "lack of financial resources" to provide for the special education guaranteed to handicapped children through both case law and legislation. S. Rep. No. 94-168, 94th Cong., 1st Sess. (1975) at 7-8. Pursuant to the Act, Congress made funds available to assist the States in providing handicapped children with a free appropriate public education.

The District Court correctly noted that Congress was concerned with the "danger of misclassification and implementation of inappropriate individual programs" and provided for "extensive procedural guarantees" to avoid the same. See B9. It does not follow, however, Congress intended these procedures to be hoisted upon a plaintiff bringing a private right of action under Section 504.

Indeed, the differences in the regulatory schemes compel the conclusion Congress had two entirely different aims in mind in promulgating the statutes.

The Education For All Handicapped Act represents a determined Congressional effort to ensure the needs of handicapped children are met on an individual basis and provides the funds to do so. Unlike the Education For All Handicapped Act, Section 504 provides no funds but is a general prohibition against discrimination by receipt of federal funds. As such it stands as a bulwark against discrimination on the basis of handicap. The mere fact that there is some overlap does not warrant a conclusion that Congress intended petitioner, or others similarly situated, to enter an administrative labyrinth peopled by educators

ill equipped to adjudicate discrimination complaints. This is made clear by the regulatory scheme of the Education For All Handicapped Act.

The Act requires each educational agency receiving assistance under the Act to provide extensive procedural safeguards (they are set forth by the District Courts at B9-B10). New York's effort to comply with the Act is reflected in Section 4401-9 of the Education Law of the State of New York. (The implementing regulations are at 8 N.Y.C.R.R. 200.1-200.17.) The District Court provided a concise summary of the responsibilities and procedures of the State and local educational agency (B21-B22). It is clear from these procedures the issues to be decided and appealed turn on the identification, classification and

placement of the child. See Section 4402 (3)(a) and (b) and 4401(1). This is entirely consistent with the mandate of the Education For All Handicapped Act. Nowhere is there any provision for adjudicating claims of discrimination.[9]

The manner and degree of discrimination in elementary and secondary schools is widespread and well entrenched. Unlike other minority groups handicapped children are all too often denied vigorous advocates because those who love

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9. There is nothing in the statutory language of the Education For All Handicapped Act to support the contention Congress intended plaintiffs bringing Section 504 claims to first exhaust the Education For All Handicapped Act administrative remedies. Indeed, Congress certainly realized decisions made under the Education For All Handicapped Act regarding identification, classification and placement would necessarily involve agency expertise. Yet it provided for *de novo* review of these decisions by the courts. §1415 (e)(2). Clearly the inference is that Congress contemplated greater not lesser access to the Courts to redress the claims of handicapped children.

them most, their parents, are lulled into the false belief their children will simply be unable to participate in the mainstream of American society. The end result is that handicapped children are perpetually excluded from the opportunity to acquire the social and educational skills necessary to participate in normal everyday affairs.

In New York, the Fleischman Commission found that,

> "* * * Conservatives estimate there were 459,200 handicapped children between the ages of 3 and 20 in New York State at the time of the 1970 census. *Of these children at least 45 percent were not receiving special educational services.*" The Fleischman Report: NYS On the Quality, Cost and Financing of Elementary and Secondary Education in NYS. Vol. II, p. 167. Viking Press (1973). (Emphasis in original.)

Of improtance here is its further finding that,

> "Many districts choose to place their handicapped children in BOCES classes rather than set up district programs because the BOCES aid formula is more favorable to them." *Id.* page 215.

Clearly placing a handicapped child in a program for fiscal rather than educational reasons is one form of discrimination that cannot be countenanced by the courts.[10] Yet if the present decision

10. The present formula for funds received under the Education For All Handicapped Act is to multiply the number of handicapped students identified and served by a fixed dollar figure to be determined by a certain percentage of the average per pupil expenditure in the nation. 20 U.S.C. 1411(a)(I). The local education agency receives funds solely on the number of children they serve without regard to the nature of the handicap involved. 1411(d). Thus, it is not surprising that at least one commentator noted that there is an incentive to identify handicapped children but not to place them in expensive programs. See, Enforcing the Right To An "Appropriate" Education: The Education For All Handicapped Children Act of 1973. 92 Harv. L. Rev. 1103, 1110 (1979).

stands this may well be the case as the following hypothetical demonstrates.

Assume that in January of 1980, a learning disabled child is placed in a BOCES[11] program which handles both learning disabled and emotionally handicapped children, and in June of 1980 the State Educational Agency decides only emotionally handicapped children will be serviced by BOCES in the future and that learning disabled children must be dealt with by the local district. Assume further that placing the child with BOCES will result in a fiscal advantage to the local districts. If a district reclass-

11. BOCES (Board of Cooperative Educational Services) is a multidistrict agency established for the purpose of carrying out shared educational services for the local school districts in its geographical area. There are numberous BOCES' throughout New York State which serve handicapped children. New York provided for the establishment of BOCES throughout the State. §1950 of the Education Law of the State of New York.

ifies the child as emotionally handicapped for fiscal reasons what kind of challenge can be mounted under the Education For All Handicapped Act procedures?[12]

It is respectfully submitted that virtually no challenge can be made except for the "appropriateness" of the classification or placement. Evidence of a change in priorities at the State level could properly be excluded at any hearing. The local agency would argue that when a child exhibits characteristics of more than one handicapping condition it may classify in accordance with the more handicapping condition. See, e.g., *Matter of Judith M.*, 18 Ed. Dept. Rep. 246. As to differentiation in programmatic activity it could con-

12. This sort of decision is not meant to encompass systemic decisions regarding the allocation of scarce educational resources.

tend it is only obligated to provide an "appropriate" program and not the best possible program. See, e.g., *Matter of Malvin N.*, 16 Ed. Dept. Rep. 83. Although, ideally these contentions should be defeated, that is hardly the point.

If relegated to the Education For All Handicapped Act procedures, the rules of evidence, burden of proof,[13] and degree of deference to agency expertise could combine to defeat legitimate claims of discrimination.[14] The State or local

13. The Second Circuit held that the burden of proof under Section 504 would be comparable to the test this Court set forth for Title VII cases in *McDonnell Douglous Corp. v. Green*, 411 U. S. 792 (1973). *New York State Association For Retarded Children v. Carey*, 612 F. 2d 644, 649 (2d Cir. 1979).

14. It is only necessary to point out that compelling resort to the statutory schemes devised by the States to comply with the mandate of the Education For All Handicapped Act would have a plaintiff's Section 504 claim turn on the nature of the state scheme. Since 49 States receive funds under the Act there will undoubtedly be a lack of uniformity resulting from the variation

agency would not be required to make any showing to rebut a prima facie case of discrimination. The agency could enter the federal forum armed with an administrative decision clothed in both reason and an expertise that it may not deserve. Even if a plaintiff ultimately prevailed after going through the administrative process he may simply end up in the position of having won the battle but lost the war.[15]

Finally, it must be pointed out that despite some recent gains handi-

(14 cont.)
of the state statutory schemes. Congress could hardly have intended such a result when promulgating an antidiscrimination statute in furtherance of our national policy against discrimination on the basis of handicap.

15. Although the "stay-put" request that a child cannot be removed from his present placement until all administrative proceedings have been completed (20 U.S.C. 1415[e][3]; 4402.1b[3][c]) will help some children, it is of no avail to a child whose current placement is the result of discriminatory conduct.

capped children remain by and large a powerless group. Petitioner vigorously contends that the District Court's reliance on *San Antonio School District v. Rodriguez*, 411 U. S. 1 (1973) (see also: *Battle v. Com. of Pa.*, 629 F. 2d 269, 77-8 [3rd Cir. 1980]), to defer to the agency's expertise is misplaced, and could render the rights handicapped children now have wholly illusory. One need only look at another powerless group for the potential consequences, namely, the men and women who people our prison. The crisis of this nations' prisoners fell on deaf ears for many years under the "hands off doctrine" (see, e.g., *Bethea v. Crouse*, 417 F. 2d 504 [10th Cir. 1969]). If the result here stands it may well be the harbinger of a similar fate for the handicapped children of our nation.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of December, One Thousand Nine Hundred and Eighty.

PRESENT: HON. LEONARD P. MOORE
HON. WILLIAM H. MULLIGAN
HON. AMALYA L. KEARSE

Circuit Judges,

- X

80-7490

NORMAN DAVIS, on behalf of his infant son, James Davis,

Plaintiff,

-against-

MAINE ENDWELL CENTRAL SCHOOL DISTRICT, LAWRENCE RICE, in his official capacity as President of the Board of Education for the Maine Endwell Central School District, WILLIAM O'CONNOR, in his official capacity as Superintendant of Schools for the Maine Endwell Central School District, and JOHN OAKES, in his official capacity as Chairman of the Committee of the Handicapped,

Defendants.

- X

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decision below of the Hon. Neal

P. McCurn, 80-CV-257 (N.D. N.Y. May 16, 1980) be affirmed in part and remanded in part. To the extent that the claim for injunctive relief was dismissed for failure of plaintiff to exhause administrative remedies, the decision is affirmed. However, it appeared at oral argument that plaintiff is now in the process of pursuing administrative remedies. Therefore, the case is remanded for consideration of the merits of the claims for compensatory damages not reached by the district court.

William H. Mulligan

Amalya L. Kearse

I dissent.

In my opinion, upon the law and the facts, no damages, compensatory or otherwise, should be awarded.

Leonard P. Moore

APPENDIX B.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

- X

NORMAN DAVIS, on behalf of his infant son, James Davis,

Plaintiff,

-v-

MAINE ENDWELL CENTRAL SCHOOL DISTRICT, LAWRENCE RICE, in his official capacity as President of the Board of Education for the Maine Endwell Central School District, WILLIAM O'CONNOR, in his official capacity as Superintendant of Schools for the Maine Endwell Central School District, and JOHN OAKES, in his official capacity as Chairman of the Committee of the Handicapped,

Defendants.

80-CV-257

- X

APPEARANCES:

RONALD R. BENJAMIN, ESQ., Attorney for Plaintiff, Suite 402 Midtown Mall, 15 Chenango Street, Binghamton, New York 13901.

HOGAN & SARZYNSKI; EDWARD J. SARZYNSKI, ESQ., Of Counsel, Attorneys for Defendants, One Marine Midland Plaza, P. O. Box 548, Binghamton, New York 13902.

NEAL P. McCURN, D.J.

MEMORANDUM-DECISION AND ORDER

This action was commenced by plaintiff Norman Davis on behalf of his handicapped eleven year old son James, seeking injunctive relief and damages for the alleged failure of defendant Maine Endwell Central School District to provide James with an appropriate free

special education. Defendants are the School District; Lawrence Rice, as President of the Board of Education for the District; William O'Connor, as the Superintendent of Schools; and John Oakes, as Chairman of the Committee on the Handicapped for the District. In bringing this lawsuit, plaintiff contends that the defendants' failure to provide his infant son with the special education he is allegedly in need of is in violation of the Education of the Handicapped Act of 1975, 20 U.S.C. §§1401 *et seq.*; the Rehabilitation Act of 1973, §504, 29 U.S.C. §794; the Civil Rights Act of 1971, 42 U.S.C. §1983, and the Due Process and Equal Protection Clauses of the United States Constitution. Jurisdiction is alleged pursuant to 28 U.S.C. §§ 1331(a) & 1343(3)(4).

The complaint in this action was filed on March 24, 1980, and was followed by plaintiff's filing on April 2, 1980, of a motion for a preliminary injunction pursuant to Rule 65 of the Fed. R. Civ. P., asking the Court to direct the defendants to provide James, who was receiving home teaching one hour per day when this action was commenced, with an individualized educational program "that will include a minimum of three hours a day individual instruction in a resource room and mainstreaming * * * into appropriate classes for the remainder of the day." Defendants have cross-moved for dismissal of the complaint under Rule 12 (b)(1) & (6) of the Fed. R. Civ. P. on the grounds of (1) lack of jurisdiction on the basis of failure by the plaintiff to exhaust administrative remedies and

(2) failure to state a cause of action upon which relief can be granted.[1] It is these motions which are presently before the Court.

I.

The Education of the Handicapped Act of 1975 was enacted by Congress in recognition of the fact that although state and local education agencies had a responsibility to provide appropriate educational services for handicapped children, the lack of financial resources often prevented them from doing so. Pursuant to the Act, federal funding

1. Counsel for the parties appeared before the Court on plaintiff's motion and defendants' cross-motion on April 15, 1980. After hearing oral argument, the Court advised counsel that a decision would be rendered first on defendant's cross-motion, and if dismissal was denied, a hearing would be scheduled on plaintiff's request for preliminary injunctive relief.

has been made available to assist those agencies in providing for the education of such children. 20 U.S.C. §1411.

State eligibility for funding under the Act is made contingent upon a demonstration by the state that it has put into effect "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. §1412(1).[2] Along with various other policy and procedural requirements imposed by the Act, 20 U.S.C. §1412(5)(B) provides that the state must establish:

> (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that

2. Detailed regulations have been issued by the Secretary of Health, Education and Welfare under the law. 45 C.F.R. §121a.

special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[3]

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3. Section 1412(5)(B) demonstrates Congressional support for the contemporary educational theory of "mainstreaming", which involves the integration of handicapped children into the regular classroom to the greatest degree possible." *Lora v. Board of Ed. of City of New York*, 456 F. Supp. 1211, 1264 (E.D.N.Y. 1978). Judge Weinstein, in discussing the concept of mainstreaming wrote that:

> Mainstreaming includes a movement away from rigid labeling. Categorizing children is viewed as destructive because is stigmatizes, promotes a sense of negative self-worth and may result in pigeonholing rather than in efforts to improve a child's condition or a classroom situation. Labeling is also feared because it may be erroneous, either as a result of misapplication of agreed upon criteria or use of criteria of questionable validity. Rigid labels are to be replaced by more flexible definitions of exceptional children, definitions designed to emphasize specific learning needs rather than defects. The child is to be placed in the least restrictive environment possible to meet these needs. *Id.* at 1267.

As an additional prerequisite to the receipt of federal funds under the Act, the state must implement and submit to the United States Commissioner of Education a detailed plan setting forth the policies and procedures to be used by the state to insure compliance with the Act, including its plan for the identification, evaluation and education of handicapped children within its boundaries. 20 U.S.C. §1413.

Of central concern in enacting this legislation was that the policies and procedures implemented by a state for dealing with handicapped children might result in the misclassification of some children, specifically by:

> (1) the misuse of appropriate identification and classification data within the educational process itself;

> (2) discriminatory treatment as the result of the identification of a handicapping condition; and
>
> (3) misuse of identification procedures or methods which results in erroneous classifications of a child having a handicapping condition.

S. Rep. No. 94-168, 94 Cong., 1st Sess., at 26-27; U. S. Code Cong. and Admin. News, pp. 1450-51 (1975).

To avoid the danger of misclassification and implementation of inappropriate individual programs, Congress has provided for extensive procedural gurantees, including the right to notice and a hearing on matters affecting a handicapped child's educational program. 20 U.S.C. §1415.

Pursuant to 20 U.S.C. §1415(b)(1)(C), any educational agency receiving financial assistance under the Act must provide:

> (C) written prior notice to the parents or guardian of the child whenever such agency or unit --
>
> (i) proposes to initiate or change, or
>
> (ii) refuses to initiate or change,
>
> the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

The section further provides at subsection (b)(1)(E) that the agency must allow the parents or guardian:

> (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child.

Included at 20 U.S.C. §1415 are detailed provisions for comprehensive administrative review of agency determin-

ations regarding a child's educational program. Subsection (b)(2) mandates that:

> (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

If the hearing held pursuant to subsection (b)(2) is conducted by a local agency, a right of appeal to the state educational agency for an impartial review is granted pursuant to subsection (c).

The procedural rights to be granted parties to these administrative hearings are set forth at subsection (d) of 20 U.S.C. §1415 which provides that:

> (d) Any party to any hearing conducted pursuant to subsections (b) or (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413[a][12] of this title.)

Once a party has completed the administrative process set forth in 20 U.S.C. §1415, judicial review of the adminis-

trative determination is made available pursuant to subsection (e)(2) which provides that:

> (2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Jurisdiction granted pursuant to 20 U.S.C. §1415(e)(2) exists without regard to the

amount in controversy [Subs. (e)(4)]. As a final procedural safeguard, the Act provides at 20 U.S.C. §1415(e)(3) that:

> (3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

II.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1976), as amended by Act of Nov. 6, 1978, Pub. L. No. 95-602, 29 U.S.C. §794 (Supp. 1979), provides that:

> No otherwise qualified handicapped individual in the United States, as defined in section 7 (7) [29 U.S.C.S. §706 (7)],

> shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *

The Second Circuit has taken the position that a private cause of action exists under Section 504 [*Leary v. Crapsey*, 566 F. 2d 863 (2d Cir. 1977); *Kampmeier v. Nyquist*, 553 F. 2d 296 (2d Cir. 1977)],[4] and recently, in *New York State Ass'n for Retarded Children v. Carey*, 612 F. 2d 644, 649 (2d Cir. 1979) stated that, "[a]s is apparent from its language, Section 504 is intended to be part of the general corpus of discrimination law."

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4. In fact, each Circuit which has thus far addressed the issue has found that the right to a private cause of action exists under Section 504 of the Act. See *Davis v. Southeastern Community College*, 574 F. 2d 1158 (4th Cir. 1978); *Lloyd v. Regional Transp. Authority*, 548 F. 2d 1277 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F. 2d 413 (8th Cir. 1977).

It is clear from the regulations promulgated under the Rehabilitation Act and set forth at Subpart D, 45 C.F.R. §84.41, that the Act is intended to apply to discrimination with regard to public education. There is, in fact, a significant overlap between the Rehabilitation Act and the Education of the Handicapped Act, and the denial of a free appropriate public school education results in a violation of both. 20 U.S.C. §1412(2)(B); 45 C.F.R. §84.33.[5]

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5. Like in the Education of the Handicapped Act, support is shown in the Rehabilitation Act for the concept of "mainstreaming." See 45 C.F.R. §84.34(a) which provides that:

> (a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient

See also *New York State Ass'n for Retarded Children v. Carey*, 446 F. Supp. 479, 485-86 (E.D.N.Y. 1978), aff'd 612 F. 2d 644 (2d Cir. 1979).

Perhaps the most significant difference is that while the term "free appropriate public education" under the Education of the Handicapped Act means the provision of special education and related services in accordance with the individual child's educational program, the term as used in the Rehabilitation Act requires that a recipient of Federal funds provide an education to each handicapped child which meets the needs of that child as adequately as the needs of

(5 cont.)
that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

nonhandicapped children are being met.[6] 45 C.F.R. §84.33(b).

The interplay between the two Acts is most obvious at 45 C.F.R. §84.36 which provides as follows:

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6. In commenting on Subpart D, 45 C.F.R. §§84.31-39, the Secretary states at 45 C.F.R. §84, App. A at p. 387, that the section:

> generally conforms to the standards established for the education of handicapped persons in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972). *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA). The basic requirements common to those cases, to the EHA, and to this regulation are (1) that the handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from misclassification of students, and (5) that procedural safeguard *(sic)* be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children * * *.

> A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of a handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. *Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting the requirement.* (Emphasis supplied.)

Although the administrative procedures applicable to Title VI (45 C.F.R. §§80.6-80.10) have been adopted for use under the Rehabilitation Act (45 C.F.R. §84.61), the Secretary has indicated at 45 C.F.R. §84, App. A at p. 387 that:

> It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart [Subpart D] (concerning identification and location, evaluation and due process procedures).

III.

Plaintiff in his complaint alleges that New York State has submitted a plan pursuant to the Education of the Handicapped Act, and that the defendant School District receives Federal funds, both under that Act and for purposes of the Rehabilitation Act of 1973. Plaintiff further contends and defendants do not deny, that his son James is a handicapped child thereby entitled to a free appropriate education under both Acts.

New York State provides for the education of children with handicapping conditions at Article 89 of the State Education Law, §§4401-09 (McKinney's Education Law, Supplementary Pamphlet 1971-79). Pursuant to Education Law §4402, each school district within the State is charged with the responsibility for ascertaining the identity of handicapped children within the district and establishing a "committee on the handicapped" (COH) responsible for identifying, reviewing, evaluating and making recommendations as to appropriate educational programs for each such child on a yearly basis. See also 8 N.Y.C.R.R. §200.3.

The Committee is required to provide the parents or guardian of a handicapped child with a "written evaluation setting forth the reasons for the recom-

mendations * * * as to appropriate educational programs and placement, and as to the advisability of continuation, modification, or termination of special class or program placements * * *." Education Law §4402(2)(b); 8 N.Y.C.R.R. §200.5(3)(b). In addition, the State law and regulations provide for notice to the parents or guardian of any determinations made by the COH with regard to the handicapped child, and of the right to an impartial hearing with review by the State Commissioner of Education available, to challenge these determinations. Education Law §4404(1); 8 N.Y.C.R.R. §200.5(b)(1) & (2), (c).

IV.

According to the complaint, James Davis has learning disabilities involv-

ing visual-motor-perceptual problems of a serious nature as well as "delayed or defective auditory development." These allegations, in fact, find substantial support in evaluations done on James and submitted to the Court by defendants. Plaintiff also indicates in the complaint that James has had some behavioral problems in school, although in an affidavit submitted by him denies that the behavioral problems extend into the home situation.

James has been a student in the Maine Endwell Central School District since 1973 when he attended the pre-kindergarten program. He was in a regular classroom situation from kindergarten through second grade. However, in December of 1976, the District's COH discussed James' situation at its meeting. A

decision was made at that time to leave him in the regular classroom for the rest of the year with special help to be provided. At the time, James' mother was apparently coming to school for part of the day to help him.

At the April 27, 1977, meeting of the COH, James was classified as learning disabled and a self-contained learning disabilities class at BOCES was recommended for the 1977-78 school year. James attended the learning disabilities class during that school year, but when the COH met on May 23, 1978, he was reclassified as emotionally handicapped and placement in a self-contained classroom for emotionally handicapped children was recommended for the 1978-79 school year.

When the COH met on May 9, 1979, James was once again classified as

emotionally handicapped and continued attendance in a self-contained classroom for the emotionally handicapped children at BOCES was recommended for the 1979-80 school year. James' mother requested a hearing regarding the recommended placement but withdrew the request, apparently as a result of the District's placement of her son in a different BOCES class for emotionally handicapped children.

According to the plaintiff, James was repeatedly suspended during the Fall of 1979 as a result of alleged behavioral problems. Plaintiff contends that the behavioral problems had not been exhibited prior to his son's attendance at BOCES. In November of 1979, James was transferred from a BOCES classroom at the Thomas J. Watson School to one at

Maine Memorial Elementary School because things were not going well in the former placement. He was immediately suspended allegedly as a result of behavioral problems until a conference could be held with his parents.

On January 9, 1980, James was officially excluded from the BOCES program, allegedly on the basis of friction between him and the teachers, which had culminated in his striking one of them on January 2, 1980. A further reason given was the inability of the BOCES officials and the child's parents to agree on the proper way to deal with James and the apparent inability of BOCES to meet James' educational needs.

Home teaching for one hour a day was arranged and implemented immediately by the defendant District pending further

evaluation of James and recommendations by the COH concerning his educational needs. The COH met on January 24, 1980, and James was once again classified as emotionally handicapped. The Committee recommended that home teaching be continued pending the receipt of additional information concerning day-schools placement. Plaintiff and his wife were sent notice of the classification and recommendation and were advised of their right to seek an impartial hearing within ten days. See 8 N.Y.C.R.R. §200.5(c). No hearing was requested.

The COH met again on February 27, 1980, with James' parents in attendance. The emotionally handicapped classification was continued and home teaching was recommended until further tests and evaluation on James were completed. The

Committee also recommended parent counseling. The report from the meeting indicates that residential placement was being considered for James.

Another meeting was scheduled for March 24, 1980, but prior to that date, plaintiff informed the defendants that he would be unable to attend and asked that the meeting be rescheduled. The next meeting of the COH was scheduled for April 21, 1980, and the plaintiff was so advised. However, prior to that date, the present action was commenced.

Subsequent to oral argument on these motions on April 15, 1980, the COH did meet, with James' parents, his three sisters and their attorney present. While retaining the emotionally handicapped classification, the COH recommended temporary placement for James of maximum

resource room time with remedial reading and mainstreaming for lunch, art, music and physical education at Endwell Intermediate School, until an appropriate residential facility can be located. Plaintiff and his wife have been advised of their right to a hearing with regard to the classification and recommended placement in a residential facility when one considered appropriate is found.

V.

Defendants assert that the complaint should be dismissed for failure to exhaust administrative remedies. This Court agrees.

It is clear that plaintiff has totally sidestepped the statutorily imposed procedures for administrative review of the Committee's decisions with

regard to the classification and placement of James. While the Court is not unsympathetic to the frustration felt by all of those involved in this case, and especially by James himself, it cannot condone a blatant disregard of the administrative procedures available under the circumstances.

The rationale behind the doctrine of exhaustion of administrative remedies is that by refusing to allow premature judicial intervention in the administrative process, the agency is given "an opportunity to develop factual findings, to apply its expertise to new issues and to exercise its discretionary powers." *Touche Ross & Co. v. Securities & Exch. Com'n*, 609 F. 2d 570 (2d Cir. 1979). Furthermore, as explained by the Supreme Court in *McKart v. United States*, 395

U. S. 185, 193-94, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969) "[n]otions of administrative autonomy require that the agency be given a chance to discover and correct its own erros," a practice which, according to the Court in *Touche Ross & Co. v. Securities & Exch. Com'n, supra,* at 574, "will protect the integrity of the administrative process and *prevent litigants from flouting the agency's procedures.*" (Emphasis supplied.)

The Supreme Court in *Weinberger v. Salfi*, 422 U. S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975) recognized a distinction between exhaustion requirements that are "statutorily specified jurisdictional prerequisite[s]," and those which have been "judicially developed." *Id.* at 766. In *Matthews v. Eldridge*, 424 U. S. 319, 330, 96 S. Ct. 893, 47

L. Ed. 2d 18 (1976), the Supreme Court makes it clear that exhaustion requirements which are statutorily imposed have a nonwaivable jurisdictional element which the courts cannot ignore.

Judicially developed exhaustion requirements, on the other hand, are much less inflexible and subject to numerous exceptions. *McKart v. United States, supra; Touche Ross & Co. v. Securities & Exchange Com'n, supra.* Included are situations in which the agency cannot supply an adequate remedy (*NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U. S. 418, 88 S. Ct. 1717, 20 L. Ed. 706 (1968); those in which there will be irreparable injury to the party seeking judicial intervention if exhaustion is required (*Touche Ross & Co. v. Securities & Exch. Com'n, supra,*

609 F. 2d at 576, n. 11); where the agency has clearly acted in excess of its statutory authority (*Leedom v. Kyne*, 358 U. S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958); *Sterling Drug, Inc. v. Weinberger*, 509 F. 2d 1236 (2d Cir. 1975); when the pursuit of administrative remedies would be futile (*Wolff v. Selective Service Local Board No. 16*, 372 F. 2d 817 (2d Cir. 1967); and cases in which "there [is] no need for the development of a factual record, no room for the exercise of agency discretion, and little need for agency expertise in deciding the question." *Touche Ross & Co. v. Securities & Exch. Com'n, supra*, 609 F. 2d at 577.

Judicial review under the Education of the Handicapped Act is, as previously discussed, available pursuant to 20

U.S.C. §1415(e)(2). Although on its face the provision appears to make exhaustion of the administrative remedies provided for at 20 U.S.C. §1415(b) & (c) a jurisdictional prerequisite, the Courts have thus far not been inclined to treat it as such, and instead have reviewed the circumstances of each case and relied upon judicially created exceptions to the exhaustion requirement when applicable. See *New York State Ass'n for Retarded Children v. Carey, supra*, 466 F. Supp. at 486, aff'd, *supra*, 612 F. 2d at 644; *Harris v. Campbell*, 472 F. Supp. 51, 54 (E.D. Vir. 1979); *North v. District of Columbia Bd. of Ed.*, 471 F. Supp. 136, 141 n. 8 (D.D.C. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235, 1244 (D. Conn. 1978).

None of the exceptions is, in the opinion of this Court, applicable in this case. Had the plaintiff brought an action seeking maintenance of the status quo with regard to James' placement at BOCES at the time he was summarily excluded from the program, exhaustion would not have been required.[7] Plaintiff,

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7. James' exclusion from BOCES and placement in a home-teaching situation without prior notice to his parents with an opportunity to request a hearing on the proposed change was in violation of 20 U.S.C. §1415(b)(1)(C) and N.Y. Educ. L. §§4402.1b(3)(c). As the District Court stated in *New York Ass'n for Retarded Children v. Carey*, *supra*, a case in which the Court waived the exhaustion requirement where handicapped children had been excluded from attending school on last minute notice to the parents:

> both N.Y. Educ. L. §4404(4) and 20 U.S.C. § 1415(e)(3), as well as the N.Y.S. Education Commissioner's regulations 8 N.Y.C.R.R. § 200.5(b)(1)(viii) contemplate that the status quo will be maintained pending objection to the proposed change upon timely notice to the parent.

Failure on the part of defendants to satisfy the procedural requirements of the Act can apparently justify a waiver of exhaustion requirements in certain instances.

however, has not asked the Court to order James returned to the BOCES program pending an administrative determination of his complaints concerning his son's education. Instead, plaintiff seeks to bypass the entire administrative procedure and have this Court order implemented what plaintiff believes to be an appropriate educational program for his son.[8] That, the Court is not willing to do at this point.

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8. Plaintiff would have the Court apply the result in *Stuart v. Nappi, supra*, in the present case. That, however, would be inappropriate in light of significant differences in the cases.

In *Stuart*, the Court waived the exhaustion requirement of 20 U.S.C. §1415(e)(2) where a handicapped student had been excluded from school for disciplinary reasons. The Court realized that by excluding her for disciplinary reasons, the district could avoid the procedural requirements of the Education of the Handicapped Act and also limit the type of program which could be recommended to meet her needs, since she would not be able to participate in classes at the school.

In any event, James has now been placed, albeit as a supposedly temporary measure, in an educational setting acceptable to plaintiff. In order to change this placement, the COH must, according to the procedural requirements under both the Education of the Handicapped Act and State law, give prior notice to James' parents of their right to a hearing to challenge the decision. 20 U.S.C. §1415(b)(1)(C); N.Y. Educ. L.

(8 cont.)

Furthermore, the Court in *Stuart* recognized that the district had sorely failed in the past in meeting the student's needs through failure to follow through on suggestions which were made as far as evaluations and placement in school. Finally, the Court in *Stuart* did not attempt to structure an educational program for the handicapped student but only enjoined the district from holding an expulsion hearing pending a determination with regard to her educational needs. While the Court is not prepared at this time to pass judgment with regard to the conclusions reached by the COH as to the appropriate educational setting for James, it is at least clear that the Committee has been diligent in its efforts to deal with his needs.

§§4402.1b(3)(c). Should the parents seek review of the proposal, James must be allowed to remain in the current placement until all review proceedings have been completed. 20 U.S.C. §1415(e)(3); 4404(4). That being the case, the plaintiff will not sustain irreparable injury in this case if required to pursue his administrative remedies. See *Touche Ross & Co. v. Securities & Exch. Com'n, supra*, 609 F. 2d at 576, n. 11. Furthermore, defendants have expressed a willingness to make administrative review available at this time even though plaintiff may have failed to request a hearing within the ten-day limit imposed by the Commissioner's regulations at 9 N.Y. C.R.R. §200.5(c).

The plaintiff contends that even if exhaustion is required under the Education of the Handicapped Act, that it is

not under the Rehabilitation Act of 1973 or 42 U.S.C. §1983. However, in assuming that position, plaintiff is completely overlooking the fact that the exhaustion requirements in the Education Act:

> represent Congressional recognition of the view expressed by the Supreme Court in another school context that these educational questions lie in an area in which the courts' 'lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.' *San Antonio School District v. Rodriguez*, 411 U. S. 1, 43, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

Harris v. Campbell, supra, 472 F. Supp. at 55.

The interplay between the procedural requirements contained in the Education of the Handicapped Act and the Rehabilitation Act of 1973 has already been

discussed, and that relationship lends support for this Court's refusal to assume jurisdiction over plaintiff's claims under the latter without first requiring exhaustion under the former. In addition, assuming jurisdiction over plaintiff's claims under the Rehabilitation Act of 1973, 42 U.S.C. §1983, and the Due Process and Equal Protection Clauses of the Constitution at this point would serve no useful purpose and would, in fact, merely serve to frustrate the clear Congressional intent with regard to administrative review of school district decisions and actions affecting handicapped students prior to judicial intervention.

Assumption of jurisdiction at this time is particularly inappropriate since the basis for all of plaintiff's other

claims is substantially the same as for his claim under the Education of the Handicapped Act, namely, the failure by the defendants to provide his handicapped son with an appropriate public education. See *Harris v. Campbell*, *supra*, 472 F. Supp. at 55.

Once the plaintiff has exhausted his administrative remedies, he is, of course, entitled to review by this Court pursuant to 20 U.S.C. §1415(e)(2). Such review would consist of examination of the administrative record as well as any additional evidence introduced at hearings which may be held by the Court upon plaintiff's request. The Court would then be empowered to grant whatever relief it saw fit based upon a preponderance of the evidence before it.

Thus, while plaintiff's complaint is hereby dismissed in its entirety, it is done so without prejudice against the plaintiff seeking review in this Court after exhaustion of the administrative remedies prescribed under 20 U.S.C. §1415. Having dismissed the complaint, it is not necessary for the Court to consider plaintiff's motion for a preliminary injunction.

IT IS SO ORDERED.

NEAL P. McCURN
U.S. District Judge

Dated: May 6, 1980
Binghamton, New York